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In the Supreme Court of the United States

OCTOBER TERM, 1971.

No. _____.

JOHN BLANK, *et al.*,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals For the Sixth Circuit

The Petitioner, John Blank, asks that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, made and entered April 28, 1972, wherein, on appeal by the United States, the granting of Petitioner's Motion to Suppress Evidence by Chief Judge Frank J. Battisti of the United States District Court for the Northern District of Ohio was vacated.

OPINIONS OF THE COURTS BELOW

The full text of the opinion of the United States Court of Appeals for the Sixth Circuit (CA 6, 4-28-72), is set out at Appendix pp. 16-24. The full text of the opinion of the United States District Court for the Northern District of Ohio, (330 Fed. Supp. 783 (1971)), is set out at Appendix pp. 9-15.

JURISDICTION

The Judgment of the United States Court of Appeals for the Sixth Circuit was entered on April 28, 1972. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether in a criminal case wherein the Petitioner was charged with operating an illegal gambling business the use as evidence against the Petitioner of his own personal handwritten records seized by agents of the FBI at his home pursuant to a search warrant violate the Petitioner's Fifth Amendment privilege against self-incrimination?

THE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V, United States Constitution:

"Amendment 5.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

18 U.S.C. 1955: Prohibition of illegal gambling businesses

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section—

(1) "illegal gambling business" means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted:

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling business and such business operates for two or more successive days, then, for the purpose of obtaining warrants for arrests, interceptions, and other searches and seizures, probable cause that the business receives gross revenue in excess of $2,000 in any single day shall be deemed to have been established.

(d) Any property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States. All provisions of

law relating to the seizure, summary, and judicial forfeiture procedures, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs laws; the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from such sale; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred or alleged to have been incurred under the provisions of this section, insofar as applicable and not inconsistent with such provisions. Such duties as are imposed upon the collector of customs or any other person in respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws shall be performed with respect to seizures and forfeitures of property used or intended for use in violation of this section by such officers, agents, or other persons as may be designated for that purpose by the Attorney General.

(e) This section shall not apply to any bingo game, lottery or similar game of chance conducted by an organization exempt from tax under paragraph (3) of subsection (c) of section 501 of the Internal Revenue Code of 1954, as amended, if no part of the gross receipts derived from such activity inures to the benefit of any private shareholder, member, or employee of such organization except as compensation for actual expenses incurred by him in the conduct of such activity.

STATEMENT OF THE CASE

On June 15, 1971, a three-count indictment was returned in the United States District Court for the Northern District of Ohio charging Petitioner John Blank and 13 others with conducting an illegal sports and horse-book gambling business, in violation of 18 U.S.C. Section 1955 (1970), and with conspiracy to violate that statute. On August 27, 1971, the District Court, per Battisti, *C.J.*, sustained a motion by Petitioner to suppress evidence seized under a search warrant. The government pursuant to 18 U.S.C. Section 3731 (1970), appealed and the United States Court of Appeals for the Sixth Circuit reversed on April 28, 1972.

The search warrant, based on a 50 page affidavit showing violations of 18 U.S.C. Sections 1955 and 371 (1970), was issued on June 2, 1971, and authorized a search of a one story single family dwelling at 15916 Mendota Avenue, Maple Heights, Ohio. The warrant directed the search of the described premises for, and the seizure of "bookmaking records and wagering paraphernalia consisting of, but not limited to, betting slips and cash, bet notices, and books of account." All of this property, the warrant stated, was intended for uses in violation of Sections 1955 and 371, Title 18 U.S.C.

On June 3, 1971, the FBI agents executed the warrant and seized various items of wagering records, including sheets reflecting the names of bettors and the amount of money owed or owing on a daily basis, and account sheets showing various computations reflecting the overall profits or losses of the business.

On August 3, 1971, Petitioner filed a motion to suppress the items seized under this warrant on the ground that the material seized "may be his handwriting, is 'testimonial,' and potentially self-incriminating and thus not

subject to seizure." Petitioner attached a brief to his motion and the Government filed a memorandum in opposition to his motion to suppress. On August 27, 1971, the District Court ordered the records suppressed against Petitioner (330 F. Supp. 783). It held no hearing but based its ruling on the motion, the brief and the memoranda filed by the parties.

The District Judge recognized the validity of the search warrant and further recognized that "the papers seized were the records of an illegal gambling business." Relying, however, upon the rationale of a recent case from the Seventh Circuit *(Hill v. Philpott,* 445 F.2d 144 (7th Cir., 1971) *cert. denied,* 404 U.S.___(1971)), 40 U.S.L.W. 3279, (set forth in full at Appendix pp. 26-38), he ruled that there is "no distinction between evidence obtained by subpoena and evidence obtained by search and seizure." He held the seized records to be "testimonial" in character and hence "per se self-incriminatory."

REASON FOR GRANTING THE WRIT

Whether in a criminal case wherein the petitioner was charged with operating an illegal gambling business the use as evidence against the petitioner of his own personal handwritten records seized by agents of the FBI at his home pursuant to a search warrant violate the petitioner's fifth amendment privilege against self-incrimination.

The disposition of the question raised herein is clearly controlled by the Fifth Amendment to the United States Constitution. If the use of Petitioner's personal papers as evidence against him, which papers were seized by the government pursuant to a search warrant, is tantamount to compelling Petitioner to be a witness against himself in a criminal case, then the Fifth Amendment clearly forbids their use against him.

In Hill v. Philpott, 445 F.2d 144 (7th Cir., 1971) cert. denied, 404 U. S.___ (1971, 40 U.S.L.W. 3279, (set forth in full at Appendix pp. 26-38), a case conceptually identical to the case at bar, the United States Court of Appeals for the Seventh Circuit in answer to the question raised in this Petition, held that such personal books and records of an accused in a criminal case could not be used as evidence against him where they had been obtained by the government pursuant to a search warrant. Such use, the Court held, would violate the accused's Fifth Amendment privilege against self-incrimination.

For the purposes of this Petition there is no need to reiterate the Seventh Circuit's constitutional arguments in support of their holding as these arguments are clearly set forth in their opinion.

In the case at bar, had the Sixth Circuit followed the rationale and the holding of the Hill case, supra, they would have affirmed the judgment of the District Court.

However, at page 4 of their opinion they expressly reject the rationale of the Hill case, supra. Quite clearly there exists a fundamental disagreement between two Courts of Appeals concerning an extremely important area of constitutional law.

It would greatly inure to the benefit of the bench, bar and law enforcement agencies throughout the nation if this Court would clarify the law and settle the disagreement.

CONCLUSION

The determination of the extent to which the Fifth Amendment privilege against self-incrimination applies to personal papers seized from an accused under a search warrant and sought to be used against him is an extremely fundamental constitutional question. The uncertainty in this important area of constitutional law created by the decision of the United States Court of Appeals for the Sixth Circuit in the case at bar should be resolved by this Court. Such resolution would greatly inure to the benefit of law enforcement agencies, and the bench and bar throughout the United States, The question presented by this Petition is, accordingly, both an extremely important constitutional question and one of great public importance.

Respectfully submitted,

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APPENDIX

APPENDIX ITEM 1

Memorandum Opinion and Order of the District Court

(August 27, 1971)

Criminal No. 71 399

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOHN BLANK, *et al.*
Defendants.

The issue presented by this motion to suppress is whether the government has the right to seize one's personal papers, pursuant to a search warrant, when the effect of such seizure would be to compel one to testify against himself. The defendant acknowledges that the search pursuant to which the papers were taken was in no way violative of the strictures of the Fourth Amendment. The defendant alleges that the writings seized constitute testimonial or communicative evidence, which is self-incriminatory and as such could not be seized in an admittedly lawful search.

The Fifth Amendment to the United States Constitution states that "no person . . . shall be compelled in any criminal case to be a witness against himself . . . " This prohibition was extended to potentially incriminating

writing in *Boyd v. United States,* 116 U.S. 616 (1886) where Mr. Justice Bradley stated that "any compulsory discovery by . . . compelling the production of one's private books and papers to convict him of a crime or to forfeit his property is contrary to the principles of a free government." 116 U.S. at 631-2 (1886). *Boyd* concerned the production of documents in accordance with the terms of a subpoena. In *Gouled v. United States,* 255 U.S. 298 (1921), this principle was extended to search warrants. Mr. Justice Clarke, writing for a unanimous Court, stated that when evidence is seized in violation of the Fourth Amendment, the Fifth Amendment forbids that the evidence may be used against a witness for to do so would compel the witness to testify against himself. While there seems to be no distinction made in the cases between search warrants and subpoenas, see *Agnello v. United States,* 269 U.S. 20 (1925); *United States v. Lefkowitz,* 285 U.S. 452 (1932), the Supreme Court has never resolved the problem that faces this court today.

The issue under examination was raised and discussed by the Seventh Circuit Court of Appeals in *Hill v. Philpott,* 445 F.2d 144 (1971). In that case Doctor Hill allegedly kept two sets of books, one for the Internal Revenue Service and one for his private files. IRS agents obtained a warrant to search for evidence of attempted tax evasion (26 USC 7201) and seized most of the doctor's "private" business records. These records, the court notes, would have been considered privileged if the government attempted to obtain them by use of a subpoena or summons. The government argued that once the validity of a search is established under the Fourth Amendment, the Fifth Amendment privilege is not and cannot be violated. The government in the case at bar has taken a similar position but it does not hold to such an absolute rule. The Seventh Circuit rejected this argu-

ment. It noted that although the "mere evidence" rule was overruled in *Warden v. Hayden* 38 U.S. 294 (1967) (compare *Gouled v. United States, supra.*) and the property orientation of the Fourth Amendment was abandoned in *Warden* and in *Katz v. United States,* 389 U.S. 347 (1968), in which the Court stated that the Fourth Amendment protects people and their rights of privacy as opposed to places and one's property, the Supreme Court has in no way attempted to diminish the Fifth Amendment's privilege which might attach to certain items of property, such as personal books and records, which were validly seized.

The government, in this case, has attempted to distinguish *Hill* on the grounds that *Hill* was a tax case and that the records sought there were the doctor's business records kept in the normal course of his legitimate medical practice. In the case at bar, the papers seized were the records of an illegal gambling business and these may in no way be construed to be records of a legitimate, legal business enterprise. The government insists that . . . "Any records kept pursuant to such a business must necessarily be considered instrumentalities of the crime." In *Hill v. Philpott,* the crime was not paying the tax and the private records seized were evidence of the crime. Here the gambling records seized were a necessary part and parcel of the crime of bookmaking." The distinction is not very clear. The government seems to rely heavily on the distinction between evidence of a crime and instrumentalities of a crime. They have conceded that some evidence may be inadmissable because of the Fifth Amendment privilege, but they have not enlightened us as to what would qualify for this honor, but regardless, none of that evidence is here present. The government does not substantiate its claim that the records kept by a successful bookmaker constitute instrumentalities of a crime.

But even if these are instrumentalities and not mere evidence as it seems to be, that goes to the question of the seizure of the evidence under the Fourth Amendment. That is not the issue. The question before this court is whether the evidence seized, be it called instrumentality or mere evidence, is violative of the Fifth Amendment privilege against self-incrimination. In both cases the records constituted evidence of the crime. Dr. Hill recorded his entries in a separate set of books and did not disclose this income to the Internal Revenue Service. The defendant allegedly recorded necessary items in order to keep up his business, which in and of itself was illegal. The defendant's alleged crime is bookmaking, not keeping records of his activities, just as Dr. Hill's crime was not informing the government of his total income rather than not keeping accurate records of his "unreported income."

There seems to be some question as to whether these records come within the category of "testimonial" or "communicative" evidence. See *Schmerber v. California* 384 U.S. 757 (1966). We find, as did the Seventh Circuit, that the Supreme Court intended that there be no distinction between evidence obtained by subpoena and evidence obtained by search and seizure.

> "In practice the result is the same to one accused of crime, whether he be obliged to supply evidence against himself or whether such evidence be obtained by an illegal search of his premises and seizure of his private papers. In either case he is the unwilling source of the evidence, and the Fifth Amendment forbids that he shall be compelled to be a witness against himself in a criminal case."

Gouled v. United States, Supra at 306. Wigmore has suggested, 8 Wigmore on Evidence §2264, that there is no compulsion to testify because proof of authenticity must come from another in the search warrant situation

as opposed to the production elicited from the issuance of a subpoena. The Seventh Circuit disposed of this argument by saying that this "sounds well as an abstract proposition, but certainly ignores the realities of trial. The jury knows the books and records belong to the defendant and the entries he has made therein speak against him as clearly as his own voice." 445 F.2d at 149. Therefore we find that this evidence is testimonial in nature.

An analogy to another series of cases seems opposite. In *Marchetti v. United States*, 390 U.S. 39 (1968), *Grosso v. United States*, 390 U.S. 62 (1968) and *Haynes v. United States*, 390 U.S. 85 (1968). The Supreme Court held that the Fifth Amendment privilege provided a complete defense to a prosecution for failure to register and pay the occupational tax on wagers, to a prosecution for failure to pay the excise tax on proceeds from wagering and to a prosecution for possession of an unregistered weapon. See *Leary v. United States*, 395 U.S. 6 (1969). The Court in deciding *Marchetti, Grosso, Haynes* and *Leary* distinguished *Shapiro v. United States*, 335 U.S. 1 (1948) on the grounds that *Shapiro* was required to supply information which had a "public aspect" (records of fruit sales which had to be kept in accordance with OPA regulations) and that they were the kind of records that a retailer customarily kept. Dr. Hill's records were similar to those of *Shapiro* while the defendant's records are closer those in *Marchetti, Grosso, Haynes* and *Leary*. Dr. Hill was a practicing physician who normally kept records of all his patients, but did not reveal all of them to IRS. Shapiro was charging more than the government approved price for some of his fruit. In both instances production of the records would show that while operating a normal and regular business Dr. Hill and Shapiro had violated the law. The Seventh Circuit noted that

the records kept were not "required records" as was the case in *Shapiro*. Since these records are immune from production by governmental subpoena we concur with the opinion of the Seventh Circuit in *Hill*. The documents, in the case at bar, however, are closer to the *Marchetti* situation. Production of these documents would, instead of showing a violation of the law as the result of abuses of a normal business, indicate and acknowledge the defendant's participation in an illegal enterprise. As such, these documents are per se self-incriminatory. *Marchetti, Grosso, Haynes* and *Leary* instruct us that the government cannot condition the payment of a tax on an admission that one is participating in illicit activities. We cannot condone the Fifth Amendment violation here either.

The dissent in *Hill* contends that in *Warden v. Hayden, supra* at 303 the Supreme Court found it unnecessary to "consider whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure." Yet the Supreme Court could not have intended to include items which by their testimonial character violate the privilege against self-incrimination. Their concern in *Warden* was the mere evidence rule and not the Fifth Amendment.

The standard of review adopted by the Seventh Circuit is one in which we concur. In examining seized records this court must determine if the records were those which are generally considered privileged from disclosure if sought by a subpoena or summons. There are numerous cases where courts have held that a taxpayer may refuse production of personal books and records by the assertion of his privilege against self-incrimination. See e.g. *United States v. Kleckner*, 273 F. Supp. 251 (D.C. S.D. Ohio 1967), App. dism. 382 F 2d 1022 (6th Cir. 1967); *Stecarti v. United States*, 416 F 2d 459 (5th Cir. 1969).

Similarly here the defendant could properly refuse to produce these records if he were required to do so by a subpoena or summons by the assertion of his Fifth Amendment privilege. Therefore the evidence against John Blank must be suppressed.

Since the claims of privilege under the Fifth Amendment are personal and since there is no question that the evidence was not validly seized, this evidence may be used against any persons other than the defendant.

IT IS SO ORDERED.

/s/ FRANK J. BATTISTI
Chief Judge

APPENDIX ITEM 2

Opinion of the United States Court of Appeals for the Sixth Circuit

(April 28, 1972)

No. 71-1849

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff-Appellant,

v.

JOHN BLANK, *et al.*,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO.

Before: EDWARDS and CELEBREZZE, *Circuit Judges*, and KEITH* *District Judge*.

EDWARDS, *Circuit Judge*. In this case the government appeals from an order entered by a District Judge in the United States District Court for the Northern District of Ohio granting defendant's motion for suppression of evidence in an organized gambling case. The evidence, which was seized under an admittedly valid search warrant, represents work sheets of a sports and horse book betting business. The sole issue presented is whether or not the fact that these records may be in the handwriting of the defendant requires the granting of defendant's motion to suppress on Fifth Amendment grounds.

There are no facts in dispute.

---

* Honorable Damon J. Keith, United States District Judge for the Eastern District of Michigan, Southern Division, sitting by designation.

On June 15, 1971, a three-count indictment was returned in the United States District Court for the Northern District of Ohio charging appellee John Blank and 13 others with conducting an illegal sports and horse-book gambling business, in violation of 18 U.S.C. § 1955 (1970), and with conspiracy to violate that statute. One of the overt acts charged in the conspiracy count was a telephone call to appellee's headquarters in which were discussed the amounts owed and owing to his bettors. On August 27, 1971, the District Court sustained a motion by appellee to suppress evidence seized under a search warrant. The government, pursuant to 18 U.S.C. § 3731 (1970), has appealed to this court.

The search warrant, based on a 50-page affidavit showing violations of 18 U.S.C. §§ 1955 and 371 (1970), was issued on June 2, 1971, and authorized a search of a one-story single family dwelling at 15916 Mendota Avenue, Maple Heights, Ohio. The warrant directed the search of the described premises for, and the seizure of "bookmaking records and wagering paraphernalia consisting of, but not limited to, betting slips and cash, bet notices, and books of account." All of this property, the warrant stated, was intended for uses in violation of §§ 1955 and 371, Title 18 U.S.C.

On June 3, 1971, the FBI agents executed the warrant and seized various items of wagering records, including sheets reflecting the names of bettors and the amount of money owed or owing on a daily basis, and account sheets showing various computations reflecting the overall profits or losses of the business.

On August 3, 1971, appellee filed a motion to suppress the items seized under this warrant on the ground that the material seized "may be his handwriting, is 'testimonial,' and potentially self-incriminating and thus not subject to seizure." Appellee attached a brief to his motion and the

government filed a memorandum in opposition to his motion to suppress. On August 27, 1971, the District Court ordered the records suppressed against appellee (330 F. Supp. 783). It held no hearing but based its ruling on the motion, the brief and the memoranda filed by the parties.

The District Judge recognized the validity of the search warrant and further recognized that "the papers seized were the records of an illegal gambling business." Relying, however, upon the rationale of a recent case from the Seventh Circuit (*Hill v. Philpott*, 445 F.2d 144 (7th Cir.), *cert. denied*, 404 U.S.___(1971)), 40 U.S.L.W. 3279, he ruled that there is "no distinction between evidence obtained by subpoena and evidence obtained by search and seizure." He held the seized records to be "testimonial" in character and hence "per se self-incriminatory."

The basic reasoning of the majority of the *Philpott* court appears to be:

> "The first premise in Dr. Hill's self-incrimination argument, and one which is not refuted by the government, is that many if not all of the records seized are records which if sought by subpoena or summons are generally considered privileged from disclosure by a taxpayer under the Fifth Amendment[2].
>
> "In numerous cases where the Internal Revenue Service has sought court enforcement of its summons pursuant to statute (26 U.S.C. § 7402), courts have held that a taxpayer may refuse production of personal books and records by assertion of his privilege against self-incrimination. See, *e. g.*, Stuart v. United States, 416 F.2d 459 (5th Cir. 1969); United States v.

"[2] It is notable that the government does not suggest that the records are producible and not privileged under the 'required records doctrine' enunciated in Shapiro v. United States, 335 U.S. 1, 68 S.Ct. 1375, 92 L.Ed. 1787 (1948). It seems apparent however, that records maintained by an individual taxpayer exceed the constitutional limits of the required records doctrine. See Grosso v. United States, 390 U.S. 62, 88 S.Ct. 709, 10 L.Ed.2d 906 (1968)."

Cohen, 388 F.2d 464 (9th Cir. 1967); United States v. Kleckner, 273 F.Supp. 251 (S.D.Ohio 1967), app. dism. 382 F.2d 1022 (6th Cir. 1967).

Hill v. Philpott, supra at 146.

Judge Fairchild in dissent in *Philpott* concerned himself more with the nature of the evidence under consideration than the method employed to obtain it:

> "Assuming, however, that there is a class of papers so intimately confidential and so much a part of personhood that they ought to enjoy a superlative privacy and be protected from seizure upon an adequately grounded warrant, it does not seem to me that the records in question here have the required character. They appar to have been maintained for business and professional purposes, with the knowledge and assistance of employees, and the manner in which they were allegedly kept and used, made them, in a sense, instrumentalities of the tax evasion offense claimed." *Hill v. Philpott, supra* at 150 *(dissenting opinion)*.

We do not need to reexamine the facts pertaining to the doctor's double bookkeeping in *Philpott* to answer the problems of our instant case. We reject the rationale which underlies the majority decision of the Seventh Circuit—at least as it applies to our instant case.

We believe that there is a valid and important distinction between records sought by subpoena and records sought by search warrant. The subpoena compels the person receiving it by his own response to identify the documents delivered as the ones described in the subpoena. The search warrant involves no such element of compulsion upon an actual or potential defendant.

On this point Wigmore says:

> "(1) It follows that the production of *documents* or *chattels* by a person (whether ordinary witness or party witness) in response to a subpoena, or to a motion to order production, or to other form of *process*

relying on his moral responsibility for truthtelling, may be refused under the protection of the privilege. This is universally conceded. For though the documents or chattels thus sought be not oral in form, and though they be already in existence and not desired to be first written and created by a testimonial act or utterance of the person in response to the process, still there is a testimonial disclosure implicit in their production. It is the witness' assurance, compelled as an incident of the process, that the articles produced are the ones demanded. No meaningful distinction can be drawn between a communication necessarily implied by legally compelled conduct and one authenticating the articles expressly made under compulsion in court. Testimonial acts of this sort—authenticating or vouching for pre-existing chattels—are not typical of the sort of disclosures which are caught in the main current of history and sentiments giving vitality to the privilege. Yet they are within the borders of its protection.

"(2) Furthermore, it follows that documents or chattels obtained from the person's control *without* the use against him of process relying on his truthtelling are *not* within the scope of the privilege. As Mr. Justice Holmes said, 'A party is privileged from producing the evidence but not from its production.' Unless some other principle prevents, the articles may be used evidentially. Obviously, the proof of their authenticity, or other circumstances affecting them, may and must be made by the testimony of other persons, without any employment of the accused's oath or testimonial responsibility. This distinction is illustrated in a variety of applications to documents and chattels obtained by search and seizure independent of testimonial process—e.g., by physical search of the person or premises without calling upon the party for any act or utterance of his own." 8 J. WIGMORE, *Evidence* § 2264 (McNaughton rev. 1961).

(Footnotes omitted.)

Here, in fact, we have no way of knowing that the instant records are connected with the defendant beyond his counsel's statement in the motion to suppress that they "may be" in his handwriing. This, however, is an important fact upon which the government must at trial bear the burden of proof and upon which, for all we know, there may be strong dispute.

More important aspects of this problem must, however, be analyzed against the language of the critical constitutional amendments (the Fourth, the Fifth, and the Fourteenth) which arguably may be involved.

The applicable language in each follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.
>
> * * *
>
> "[N]or shall [any person] be compelled in any criminal case to be a witness against himself, . . ." U.S. CONST. amend. V.
>
> * * *
>
> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; . . ." U.S. CONST. amend. XIV, § 1.

No claim is advanced that there has been any violation of the specific language of the Fourth Amendment. And we have already pointed out that the valid search warrant does not "compel" the defendant to do anything in Fifth Amendment terms. Appellee's ultimate reliance therefore must be upon the right of privacy as described by the Supreme Court in Fifth Amendment terms in *Warden v. Hayden*, 387 U.S. 294 (1967), and *Schmerber v. California*, 384 U.S. 757 (1966), and in Fourteenth Amend-

ment terms in *Griswold v. Connecticut*, 381 U.S. 479 (1965).

We believe the Supreme Court's closest approach to the problems of this case may be found in the language quoted from the *Schmerber* and *Hayden* cases below:

> "It is clear that the protection of the privilege reaches an accused's communications, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers. *Boyd v. United States*, 116 U.S. 616.
>
> * * *
>
> "In the present case, however, no such problem of application is presented. Not even a shadow of testimonial compulsion upon or enforced communication by the accused was involved either in the extraction or in the chemical analysis." *Schmerber v. California, supra* at 763-765.
>
> "The items of clothing involved in this case are not 'testimonial' or 'communicative' in nature, and their introduction therefore did not compel respondent to become a witness against himself in violation of the Fifth Amendment. *Schmerber v. California*, 334 U. S. 757. This case thus does not require that we consider whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure." *Warden v. Hayden, supra* at 302-03.

Turning from this analysis to the facts of this case, we find herein:

1) The subjects of the seizure are not personal communications at all but rather business accounts rendered extraordinary only by the fact that the business is itself illegal.

2) These are not privately recorded and privately held thoughts or descriptions of events, as in the case of

a closely held diary,[1] but rather business records of which other persons must have knowledge.

Further, the *Hayden* Court overruled the "mere evidence" exclusion of *Gouled (Gouled v. United States,* 255 U.S. 298 (1921)) in language which applies a fortiori to instrumentalities of a crime:

> "The premise in *Gouled* that government may not seize evidence simply for the purpose of proving crime has likewise been discredited. The requirement that the Government assert in addition some property interest in material it seizes has long been a fiction, obscuring the reality that government has an interest in solving crime. *Schmerber* settled the proposition that it is reasonable, within the terms of the Fourth Amendment, to conduct otherwise permissible searches for the purpose of obtaining evidence which would aid in apprehending and convicting criminals. The requirements of the Fourth Amendment can secure the same protection of privacy whether the search is for 'mere evidence' or for fruits, instrumentalities or contraband. There must, of course, be a nexus—automatically provided in the case of fruits, instrumentalities or contraband—between the item to be seized and criminal behavior. Thus in the case of 'mere evidence,' probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction. In so doing, consideration of police purposes will be required. Cf. *Kremen v. United States,* 353 U. S. 346."

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[1] We note that the Tentative Draft of the Model Code of Pre-Arraignment Procedures would provide:

> "[T]hings subject to search and seizure * * * shall not include personal diaries, letters, or other private writings or recordings, made solely for personal use or communication to a person occupying a family, personal, or confidential relationship other than a relationship in criminal enterprise, unless such things have served or are serving a substantial purpose in furtherance of a criminal enterprise." Model Code of Pre-Arraignment Procedure § SS1.03(2) (Tent. Draft No. 4, 1971).

Warden v. Hayden, 387 U.S. 294, 306-07 (1967). (Footnote omitted.)

In summary we feel that appellant was not "compelled" to produce these papers in violation of the Fifth Amendment; that the papers are not communicative in nature; that the papers are business records rather than personal and private writings; and that they are on their face instrumentalities of the crime with which appellant is charged. So viewed, they are subject to seizure under Fourth Amendment search warrant procedures and having been so seized, should not have been suppressed.

The judgment of the District Court is vacated and the case is remanded for further proceedings consistent with this opinion.

APPENDIX ITEM 3

Judgment Entry of the United States Court of Appeals for the Sixth Circuit

(Entered April 28, 1972)

No. 71-1849

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant

vs.

JOHN BLANK, *et al.*,
Defendant-Appellee

Appeal from the United States District Court for the Northern District of Ohio.

This cause came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby vacated and the case remanded for further proceedings consistent with the opinion.

No costs awarded. Rule 39(B). Entered by order of the Court.

JAMES A. HIGGINS, *Clerk*

APPENDIX ITEM 4

Opinion of the United States Court of Appeals for the Seventh Circuit, 445 F.2d 144 (1971)

(May 17, 1971)

No. 18487

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

VINCENT R. HILL,
Appellant,

vs.

JAY G. PHILPOTT, *et al.,*
Appellees.

Rehearing Denied July 29, 1971.

Before DUFFY, Senior Circuit Judge, FAIRCHILD, Circuit Judge, and CAMPBELL, Senior District Judge.*

This case concerns the extent to which a citizen's personal books and records are protected by the Fourth and Fifth Amendments against seizure by the government. Petitioner-Appellant, Dr. Vincent R. Hill, commenced this action in the district court by seeking a rule to show cause why certain properties seized pursuant to search warrants should not be returned and suppressed on the grounds that the seizure was in violation of his constitutional rights under the Fourth and Fifth Amendments. The district court denied the petition and refused the request for the return or suppression of the property. Its memorandum opinion is reported as United States v. Premises, 801 North Seventh Street, 310 F.Supp. 1316 (S.D.Ill.1970). This appeal followed.

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* Senior Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

The facts giving rise to this somewhat unusual proceeding are as follows. Dr. Hill, a licensed physician and surgeon, has been engaged in the practice of medicine in Springfield, Illinois for more than twenty years. On February 19, 1970, a special agent of the Intelligence Division of the Internal Revenue Service presented to the district court applications for search warrants directed against Dr. Hill's residence and office. In support of the applications for warrants, the special agent presented the affidavits of four former employees of Dr. Hill detailing his office procedures which indicated that the financial records relating to certain patients were kept separate from the general patient and financial records. The records relating to these patients were called "Red Letter Folders." One former employee stated in her affidavit that the employees were directed, "that if any tax man visited the office to make an investigation, one employee should occupy him in the receptionist's area and the other employee was to incinerate all of the 'red letter folders' contained in the office in the automatic incinerator."

An affidavit of a "Red Letter" patient of Dr. Hill stated that at least one or two checks tendered to Dr. Hill for visits showed a second endorsement by Myers Brothers Department Store in Springfield. The affidavit of the special agent concluded, that based on his experience there was probable cause to believe that the actions and practices described by the former employees of Dr. Hill, "were analogous with conduct such as : (1) keeping a double set of books, (2) making alterations, (3) concealing sources of income, and (4) destroying or proposing to destroy records in furtherance of concealment, and are designed to prevent or controvert discovery of the omission." The affidavit further concluded, "All of such acts and conduct constituted an attempt to evade or defeat

income tax laws in violation of Title 26, U.S.C., § 7201 * * *".

The district court found that the affidavits established "probable cause" for the issuance of the warrants and, "also established that the papers, books, records, and documents sought to be seized were the instrumentalities by which the crimes of wilfully attempted tax evasion had been and were then being committed, as well as evidence of the crimes of wilfully attempted tax evasion." 310 F. Supp. at 1320. Two search warrants directed to Dr. Hill's residence and office were issued. The warrants described the objects of the search in terms which included most if not all of the financial and medical records maintained by Dr. Hill. The property to be seized as recited in the warrants is set forth in the margin.[1]

Agents of the I.R.S. searched the office and home of Dr. Hill that same day and seized and removed thirty-five (35) cardboard cartons comprising what the agents described as a "truckload of books, records and papers." The next day Dr. Hill presented his petition for an order directing that the property seized be returned and suppressed on the grounds that the seizure was in violation of the petitioner's constitutional rights, particularly under

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[1] "Fiscal records relating to the income and expenses of Dr. Vincent R. Hill from his medical practice and other sources since January 1, 1963, including but not limited to control records and ledger cards compiled and kept by use of a Burroughs machine bookkeeping system; log books; or journals; copies of receipts covering payments of fees; appointment books; records of visitations of patients away from the medical office; patients folders and their contents; adding machine tapes; bank deposit slips; bank statements; cancelled checks; copies of federal income tax returns; and divers other records of financial transactions which are intended for use in violating the provisions of the Internal Revenue laws or regulations prescribed thereunder, or which have been so used; particularly Sections 7302 and 7201 of the Internal Revenue Service laws (26 U.S.C. 7302-7201). Said records also comprise evidence of criminal offenses in violation of the laws of the United States within the meaning of Section 3103(a), 18 U.S.C."

the Fourth and Fifth Amendments. No criminal proceedings are pending against Dr. Hill.

In this court, as in the court below, Dr. Hill urges three propositions: (1) the seizure of his private books, papers and documents in the manner described above violated his privilege against self-incrimination as contained in the Fifth Amendment to the Constitution; (2) the broad language in the search warrants constitutes "a general warrant" and the search was therefore unreasonable and in violation of his constitutional rights under the Fourth Amendment to the Constitution; and (3) the seizure of his books and records under the warrants and in the manner as described above deprived him of his property without due process of law in violation of the Fifth Amendment to the Constitution.

The district court considered and rejected all three contentions and denied Hill's petition for the return of the property and the suppression of the evidence. We consider only the first contention, which is based on the petitioner's privilege against self-incrimination.

The first premise in Dr. Hill's self-incrimination argument, and one which is not refuted by the government, is that many if not all of the records seized are records which if sought by subpoena or summons are generally considered privileged from disclosure by a taxpayer under the Fifth Amendment[2].

In numerous cases where the Internal Revenue Service has sought court enforcement of its summons pursuant to statute (26 U.S.C. § 7402), courts have held that a tax-

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[2] It is notable that the government does not suggest that the records are producible and not privileged under the "required records doctrine" enunciated in Shapiro v. United States, 335 U.S. 1, 68 S.Ct. 1375, 92 L.Ed. 1787 (1948). It seems apparent however, that records maintained by an individual taxpayer exceed the constitutional limits of the required records doctrine. See Grosso v. United States, 390 U.S. 62, 88 S.Ct. 709, 19 L.Ed.2d 906 (1968).

payer may refuse production of personal books and records by assertion of his privilege against self-incrimination. See, *e. g.*, Stuart v. United States, 416 F.2d 459 (5th Cir. 1969); United States v. Cohen, 388 F.2d 464 (9th Cir. 1967); United States v. Kleckner, 273 F.Supp. 251 (S.D. Ohio 1967) app. dism. 382 F.2d 1022 (6th Cir. 1967).

As indicated, the government admits that production of the records in question could properly be refused if sought by summons. It argues, however, that because the records in this case were obtained pursuant to a search warrant proper in form, the only question is whether the warrant was issued in compliance with the Fourth Amendment as implemented by the United States Code and the Federal Rules of Criminal Procedure. See 18 U.S.C. § 3103(a); Rule 41, F.R.Crim.Proc. It thus diminishes Dr. Hill's self-incrimination argument to what it describes as, "an abortive assault on the constitutionality of Rule 41(e) of the Federal Rules of Criminal Procedure," which authorizes the issuance of search warrants based on probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

In short, the government takes the position that once the validity of a search is established under the Fourth Amendment—and by that fact alone—the Fifth Amendment is not and cannot be violated.

The relationship between the Fourth and Fifth Amendments as each pertains to an individual's right to refuse the production of his personal books and records is not a new problem to the courts. As early as Boyd v. United States, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1885), the Supreme Court discussed the "intimate relation" between the two Amendments. In *Boyd*, the defendant was ordered to produce an invoice relating to several cases of glass which were alleged to have been

fraudulently imported. The production order was based on a statute which required production and which further provided that failure to so produce would serve as an admission of the offense alleged. In discussing the "intimate relation" between the two Amendments the Court stated (at p. 633, 6 S.Ct. at p. 534):

> "* * * compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the fifth amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the fourth amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself."

[1] Although the *Boyd* case involved a court-issued production order and not a search and seizure[3], its reasoning was relied on by the Supreme Court in a later case, Gouled v. United States, 255 U.S. 298, 41 S.Ct. 261, 65 L.Ed. 647 (1921), which did involve a search made pursuant to a warrant. In that case the defendant was charged with defrauding the government in certain procurement contracts. Documents were taken from his office and used as evidence against him over his objection that their seizure and introduction into evidence violated his Fourth and Fifth Amendment rights.

In considering these contentions raised in *Gouled*, the Supreme Court first distinguished the seizure of "mere evidence" as opposed to the seizure of the "instrumentalities of a crime." The distinction was essential because,

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[3] See concurring opinion of Mr. Justice Miller, 116 U.S. at 638, 65 S.Ct 524; see also 8 Wigmore on Evidence § 2264, n. 4. It is clear, however, that the Fourth Amendment's protection against unreasonable search and seizure may be violated by a court order to produce evidence. See In Re Antonio Dionisio and Charles Bishop Smith, witnesses before the Special February 1971 Grand Jury, 442 F.2d 276 (7th Cir. 1971).

under the theory prevailing at that time, the government's right to seize evidence and the right of a citizen to resist such seizure were both dependent upon the property interest each could assert as to the evidence sought to be seized. If the property was the fruits of a crime, *e. g.*, stolen goods, or the instrumentalities of a crime, the property rights in these items were considered forfeited to the State and were contraband. The government thus had a right to seize such property. If the property was not the fruits or instrumentalities of a crime it was not subject to seizure. In *Gouled*, the Court held that the papers seized were not "instrumentalities of a crime," which would have permitted their seizure, but were rather "mere evidence" and, therefore, the seizure was in violation of the Fourth Amendment and their admission into evidence would be a violation of the Fifth Amendment.

The teachings of *Gouled* concerning the Fourth Amendment were thoroughly reconsidered in Warden v. Hayden, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967). The "mere evidence" theory was overruled and the property concept was rejected in favor of an approach which looks more to the rights of privacy which the Fourth Amendment was intended to protect—rather than the property claims the parties might assert.

Thus a search and seizure may be unreasonable under the Fourth Amendment even though the government asserts superior property rights in the property seized.

> "We have recognized rights that the principal object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers, rested on property concepts."
>
> * * * * *
>
> "And with particular relevance here, we have given recognition to the interest in privacy despite

the complete absence of a property claim by suppressing the very items which at common law could be seized with impunity: stolen goods, Henry v. United States, 361 U.S. 98 [80 S.Ct. 168, 4 L.Ed.2d 134]; instrumentalities, Beck v. Ohio, 379 U.S. 89 [85 S.Ct. 223, 13 L.E.2d 142]; McDonald v. United States, *supra* [335 U.S. 451, 69 S.Ct. 191, 93 L.Ed. 153]; and contraband, Trupiano v. United States, 334 U.S. 699 [68 S.Ct. 1229, 92 L.Ed. 1663]; Aguilar v. [State of] Texas, 378 U.S. 108 [84 S.Ct. 1509, 12 L.Ed.2d 723]" (387 U.S. at 304-306, 87 S.Ct. at 1648-1649).

The *Warden* decision thus eliminates any distinction as between items which may be considered "mere evidence" and those which may be "instrumentalities, fruits of crime, or contraband."[4] In overruling *Gouled* as to its Fourth Amendment teachings, we do not believe that the Court intended to in any way diminish the Fifth Amendment characteristics which might attach to certain items of property such as personal books and records. Indeed, the Fifth Amendment holding of *Gouled* which concluded that the documents there at issue were protected appears still to be applicable, as that aspect of the case was not mentioned in the *Warden* opinion.

In the previous term, the Court in Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), clearly intimated that in any case where a seizure under the Fourth Amendment also involves Fifth Amendment claims, the first step in considering a motion to suppress is to determine whether the introduction into evidence of the material seized would violate the Fifth Amendment. This is to be determined by inquiry as to whether the evidence "relates to some communicative act or writing." If it does, the search is barred under both Amendments.

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[4] In response to the *Warden* decision, Congress adopted a statute which authorizes the issuance of a warrant to search for and seize "mere evidence," 18 U.S.C. § 3103(a).

Significantly, the *Warden* Court immediately distinguished the nature of the evidence seized in that case from the books and papers involved in both *Boyd* and *Gouled*.

> "The items of clothing involved in this case are not 'testimonial' or 'communicative' in nature, and their introduction therefore did not compel respondent to become a witness against himself in violation of the Fifth Amendment. Schmerber v. [State of] California, 384 U.S. 757 [86 S.Ct. 1826, 16 L.Ed.2d 908]. This case thus does not require that we consider whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure." (387 U.S. at 302-303, 87 S.Ct. at 1648).

The government argues that the evidence here at issue is not testimonial or communicative in nature because its introduction into evidence will not violate the Fifth Amendment privilege—because its seizure did not violate the Fourth Amendment. But this constitutional question begging is little help in our effort to resolve the issue before us. Whether the evidence seized is "testimonial" or "communicative" in nature is the *first step* in the process in determining whether it may be privileged. If it is testimonial or communicative the privilege may apply.

The government also argues that the Fifth Amendment is not applicable because, unlike the circumstances when it proceeds by summons, no compulsion is involved in this case. This theory is best articulated by Dean Wigmore, in his treatise on evidence,[5] wherein he opines that there is no compulsion, because, "the proof of their authenticity, or other circumstances affecting them, may and must be made by the testimony of other persons, without any employment of the accused's oath or testimonial responsibility."

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[5] 8 Wigmore on Evidence, § 2264.

This theory has also been accepted by other writers. See Duke, Prosecutions for Attempts to Evade Income Tax: A Discordant View of a Procedural Hybrid, 76 Yale L.J. 1, 47 (1966). The writer there relies on the theory —since discredited in Warden v. Hayden—that these books or records may be instrumentalities of a crime and adds, "And if a valid search warrant is obtained, the agent may seize the taxpayer's books and avoid the fetters of the Fifth Amendment, since he has not compelled the taxpayer to produce any evidence, but has required him merely to step aside while the agent helps himself." See also, Comment, the Fourth and Fifth Amendments—Dimensions of an "Intimate Relationship", 13 U.C.L.A.L. Rev. 857, 864 (1966).

In our view, and we believe in the view of the Supreme Court, Dean Wigmore's distinction between obtaining papers from a defendant by search and seizure rather than by force of process is more shadow than substance. As well stated by the Supreme Court in *Gouled, supra*, 255 U.S. at p. 306, 41 S.Ct. at p. 264:

> "In practice the result is the same to one accused of crime, whether he be obliged to supply evidence against himself or whether such evidence be obtained by an illegal search of his premises and seizure of his private papers. In either case he is the unwilling source of the evidence, and the Fifth Amendment forbids that he shall be compelled to be a witness against himself in a criminal case."

The Supreme Court has reiterated this principle in subsequent cases, see Agnello v. United States, 269 U.S. 20, 46 S.Ct. 4, 70 L.Ed. 145 (1925) and United States v. Lefkowitz, 285 U.S. 452, 52 S.Ct. 420, 76 L.Ed. 523 (1932), and the same proposition appears implicit in the Court's rationale in both Warden v. Hayden, 387 U.S. 294, 87 S.Ct. 1642 (1967) and Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826 (1966).

Dean Wigmore's suggestion that there is no compulsion to testify because proof of authenticity must come from others without the help of the accused sounds well as an abstract proposition, but certainly ignores the realities of trial. The jury knows the books and records belong to the defendant and the entries he has made therein speak against him as clearly as his own voice. This seems particularly true in a prosecution for violation of the income tax laws.

In recent years this court has zealously guarded the Fifth Amendment rights of citizens confronted with possible penalties or prosecutions for violation of income tax laws. In United States v. United States Coin and Currency In the Amount of $8674.00, 393 F.2d 499 (7 Cir. 1968), aff'd., 1971, 401 U.S. 715, 91 S.Ct. 1041, 28 L.Ed. 2d 434, we held that the petitioner there could properly assert his Fifth Amendment privilege in a forfeiture proceeding brought pursuant to 26 U.S.C. § 7302. In United States v. Dickerson, 413 F.2d 1111 (7 Cir. 1969), we held that the *Miranda* warnings must be given to a taxpayer under criminal investigation by the Internal Revenue Service at the inception of the first contact with the taxpayer after his case has been transferred to the Intelligence Division of the Internal Revenue Service for possible criminal prosecution. See also, United States v. Lackey, 413 F.2d 655 (7 Cir. 1969); United States v. Habig, 413 F.2d 1108 (7 Cir. 1969). We would vitiate the effects of those decisions if we ruled today that the government could avoid all Fifth Amendment considerations by merely obtaining a search warrant.

[2] In deciding this case as we do, we are not unmindful of the very difficult task that confronts the Internal Revenue Service in meeting its responsibility to enforce the income tax laws. There is no evidence, however, that the availability of the privilege against self-

incrimination has unduly interfered with prosecutions which result from investigations wherein taxpayers' books and records have been sought by a summons. We believe the same experience will prove true in future cases involving searches and seizures.[6] Of course, the Fifth Amendment makes the business of criminal prosecution more difficult, but this is its clear intent.

The order of the district court is reversed and the cause is remanded with directions to reconsider the taxpayer's petition in light of this opinion.

FAIRCHILD, Circuit Judge (dissenting).

One of appellant's arguments was that the warrant failed to fulfill the fourth amendment requirement that the things to be seized be "particularly" described. The majority decision is based on a different ground, and I assume, for the present purpose, that the warrant was sufficient in this respect. I also assume the appealability of the order.

In Warden v. Hayden (1967), 387 U.S. 294, 303, 87 S.Ct. 1642, the Supreme Court found it unnecessary to "consider whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure." In order to suppress the evidence in this case, it would be necessary to decide

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[6] On oral argument government's counsel suggested that it would have proceeded by summons in this case, but the defendant would have destroyed the records. Of course his destruction of the records would have been a pointless gesture, because as the government has been willing to admit, had it proceeded by summons, he could have relied on the Fifth Amendment privilege and refused production. Furthermore, destruction of books and records by a taxpayer itself provides strong evidence of willfulness and concealment. United States v. Holovachka, 314 F.2d 345 (7th Cir. 1963); Balter, Tax Fraud and Evasion (3d Edit.) Section 13.3-5.

both that such class does exist, and that the business and professional records seized from appellant are within it.

Such a class would be difficult to define whether one were basing its existence on the policy underlying the fourth amendment or the fifth. Judge Friendly suggested in United States v. Bennett (2d Cir., 1969), 409 F.2d 888 "that an approach geared to the objective of the Fourth Amendment to secure privacy would seem more promising than one based on the testimonial character of what is seized." He also noted that Katz v. United States (1967), 389 U.S. 347, 354, 88 S.Ct. 507, 19 L.Ed.2d 576, authorized warrants for limited surveillance of telephone communications, but that such communications, like papers, would often be "testimonial."

Assuming, however, that there is a class of papers so intimately confidential and so much a part of personhood that they ought to enjoy a superlative privacy and be protected from seizure upon an adequately grounded warrant, it does not seem to me that the records in question here have the required character. They appear to have been maintained for business and professional purposes, with the knowledge and assistance of employees, and the manner in which they were allegedly kept and used, made them, in a sense, instrumentalities of the tax evasion offense claimed.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1538

JOHN BLANK, ET AL., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner is under indictment in the United States District Court for the Northern District of Ohio, charged with three counts of having participated with others in conducting an illegal sports and horse-book betting business, in violation of 18 U.S.C. 1955, and with having conspired to commit the substantive offenses. Just prior to the return of the indictment, F.B.I. agents, on June 3, 1971, executed an admittedly valid search warrant, seizing from the described premises wagering records, including sheets showing the names of bettors and the amount of money owed or

owing on a daily basis, and other sheets showing the overall profits and losses of the business.

On August 3, 1971, petitioner filed in the district court a motion to suppress the items seized on the ground that the material "may be [in] his handwriting, is 'testimonial,' and potentially self-incriminating and thus not subject to seizure" (Pet. 5–6) under the Fifth Amendment. The district judge (Pet. App. 9–15; 330 F. Supp 783) granted the motion, relying on *Hill* v. *Philpott*, 445 F. 2d 144 (C.A. 7), certiorari denied, 404 U.S. 991. The government appealed under 18 U.S.C. 3731, and the court of appeals reversed (Pet. App. 16–24).

Petitioner contends that certiorari should be granted because the holding of the Sixth Circuit is in direct conflict with the Seventh Circuit's decision in *Philpott*. In *Philpott*, however, the items seized pursuant to a valid search warrant were tax records and other private papers of a doctor who was suspected of tax evasion. A divided panel of the Seventh Circuit held that the seizure was inconsistent with the Fifth Amendment privilege against self-incrimination. Viewing *Warden* v. *Hayden*, 387 U.S. 294, and other decisions of this Court[1] as implying that there is a special category of "testimonial" or "communicative" evidence, the very nature of which renders a seizure thereof inconsistent with the right to remain silent under the Fifth Amendment, the majority in *Philpott*

[1] The court in *Philpott* also relied on *Schmerber* v. *California*, 384 U.S. 757, and *Gouled* v. *United States*, 255 U.S. 298; and it referred to dicta in *Boyd* v. *United States*, 116 U.S. 616.

concluded that the doctor's "private" set of tax records fell within that category.

Whatever special protection might properly be invoked under the Fifth Amendment with respect to an otherwise permissible seizure of a physician's private tax records—a question which is, we think, not without difficulty—it does not follow that the business records of an illegal gambling operation are entitled to similar protection. Such records contain no information of a distinctly private nature; the personal thoughts and opinions of an individual are not involved; indeed, the papers contain little more than a running account of amounts owed by or owing to persons engaged in illicit gambling activities.[2] As this Court stated in a related context in *Stanford* v. *Texas*, 379 U.S. 476, 485 n. 16: "A 'book' which is no more than a ledger of an unlawful enterprise * * * might stand on a quite different constitutional footing from the books * * * [that reflect thoughts, opinions, beliefs, or mere predilictions of their possessors]."

The courts of appeals have consistently held that the seizure of records of an illegal business such as gambling does not infringe the self-incrimination clause of the Fifth Amendment. See, *e.g.*, *United States* v. *Hanon*, 428 F. 2d 101, 106–107 (C.A. 8) (*en banc*), certiorari denied, 402 U.S. 952; *United States* v. *Clancy*, 276 F. 2d 617, 629–631 (C.A. 7), reversed on other grounds, 365 U.S. 312; see also *United States*

[2] The fact that the records "may be" in petitioner's handwriting is of no significance for Fifth Amendment purposes. See *Schmerber* v. *California*, 384 U.S. 757, 763–764.

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In the Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-1538

JOHN BLANK, *et al.*,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The United States suggests that there is no conflict between the holding of the Sixth Circuit in the case at bar, *United States v. Blank*, 459 F.2d 383, and the holding of the Seventh Circuit in *Hill v. Philpott*, 445 F.2d 144, certiorari denied, 404 U.S. 991. In support of this suggestion the Government attempts to distinguish the two cases. However, the Government's suggestion that the holdings are distinguishable is directly contradicted by the Sixth Circuit in its opinion below.

It was clear to the Sixth Circuit that in order to reverse the trial court it must reject the holding in *Philpott*. In reference to the *Philpott* case, the Sixth Circuit states, "We reject the rationale which underlies the majority decision of the Seventh Circuit—at least as

it applies to our instant case." *United States v. Blank, supra*, 459 F.2d at 385.

All of the authorities cited by the Government to this Court in support of Government's suggestion that the two holdings can be distinguished were also cited to the Sixth Circuit in the Government's brief below. Considering these authorities and an argument identical to the one set forth in the Memorandum for the United States in opposition herein, the Sixth Circuit clearly indicated that its holding is in direct conflict with the holding in *Philpott*.

The conflict which exists between the Sixth Circuit and the Seventh Circuit involves an area of fundamental constitutional law. This Court should not permit the Fifth Amendment rights of an accused to vary from circuit to circuit.

By reason of the foregoing, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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